Supreme Court of the United States.

DECEMBER TERM, 1872.

FREDERICK W. HANNEWINKLE, Appellant,

vs.

The Mayor, Board of Aldermen, and Board of Common Council of Georgetown, and George W. Beall, Collector.

No. 201.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF THE APPELLANT.

SAM'L TYLER,
Solicitor for Appellant.

McGill & Witherow, Printers, 1107 E street, Washington, D. C.

Supreme Court of the United States.

DECEMBER TERM, 1872.

FREDERICK W. HANNEWINKLE, Appellant,

vs.

THE MAYOR, BOARD OF ALDERMEN, AND BOARD OF COMMON COUNCIL OF GEORGETOWN, AND GEORGE W. BEALL, Collector.

No. 201.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF THE APPELLANT.

STATEMENT OF FACTS.

This is a case of injunction granted upon a bill in equity, filed by the appellant against the Corporation of Georgetown and its collector of taxes, enjoining them from selling certain real estate belonging to the appellant, situated within the corporate limits of Georgetown, for a pretended tax claimed to be due the corporation.

The facts of the case are set forth in the bill in equity, beginning at the 3d section of the bill, as follows:

"3. That by the 4th section of the act Congress, 1809, ch. 30' which is a part of the corporate charter of said Georgetown, entitled "*An act supplementary to an act entitled 'An act to amend the charter of Georgetown,*" it is enacted,

"That the said corporation shall have power to lay out, open, extend, and regulate streets, lanes, and alleys within the limits of the town, as before described, under the

following regulations, that is to say: the mayor of the town shall summon twelve freeholders, inhabitants of the town, not directly interested in the premises, who being first sworn to assess and value what damages would be sustained by any person or persons by reason of opening or extending any street, lane, or alley, (taking all benefits and inconveniences into consideration,) shall proceed to assess what damages would be sustained by any person or persons whomsoever, by reason of such opening or extension of the street; and shall also declare to what amount in money each individual benefited thereby shall contribute and pay towards compensating the person or persons injured by reason of such opening and extension; and the names of the person or persons so benefited, and the sums which they shall respectively be obliged to pay shall be returned under their hands and seals to the clerk of the corporation, to be filed and kept in his office; and the person or persons benefited by opening or extending any street, and assessed as aforesaid, shall respectively pay the sums of money so charged and assessed to them, with interest thereon at the rate of six per cent. per annum, from the time limited for the payment thereof until paid; and the sums of money assessed and charged, in manner aforesaid, to each individual benefited in manner aforesaid, shall be a lien upon and bind all the property so benefited to the full amount thereof: *Provided, always*, That no street, lane, or alley shall be laid out, opened, or extended until the damages assessed to individuals, in consequence thereof, shall have been paid, or secured to be paid."

By this section of the act of Congress two classes of owners of property on a street intended to be opened or extended are supposed, those who are damaged and those who are benefited. Those who are benefited are to be assessed to pay damages to those who are damaged, and the assessment is made a lien on each piece of property benefited, rendering it liable to be sold for the purpose of paying those who are damaged. And until the damages assessed to individuals have been paid, or secured to be paid, the street cannot be laid out, opened, or extended.

4. That by virtue of and under the authority of the said section of the said act of Congress, the Mayor, Board of Aldermen, and Board of Common Councilmen of George-

town did, on the sixth day of June, 1868, pass an ordinance, by which it was ordained: "That the mayor be, and is hereby, authorized and requested to institute the necessary proceedings provided for in the 4th section of the act of Congress entitled '*An act supplementary to the act entitled "An act to amend the charter of Georgetown,"*' approved March 3, 1809, in order to condemn to public use and to open and improve an extension of Stoddard street, from a point on Congress street opposite the north line of Stoddard street, to High street, according to the plat of the surveyor of June 5, 1868.

5. That the plaintiff owns and is seized and possessed in fee simple of a lot or piece of land situated in Georgetown aforesaid, in Beall's addition, running 235 feet west side of Congress street, 470 feet south side of Stoddard street, 329 feet east side of Valley street. That said premises have on them a commodious dwelling-house, and all the ground of the premises is improved as a yard and garden with reference to the dwelling-house, and the whole is one homestead, and as such has been occupied and used for half a century, and is still occupied and used as one homestead and undivided lot or piece of land. That the plaintiff does not own any other lot or piece of land within the corporate limits of Georgetown, except about seven feet fronting on Beall street, remote from the street and property assessed as benefited, and was not considered in the assessment for benefits in the assessment here considered.

6. That by virtue of the ordinance before mentioned, the mayor of Georgetown aforesaid did summon twelve freeholders, according to the provision of the 4th section of the act of Congress of 1809, ch. 30, who being duly sworn did, on the 14th day of September, 1868, condemn to public use, in opening and extending Stoddard street, a part of said lot belonging to the said plaintiff, and assessed his damages (taking all benefits and inconveniences into consideration, according to the requirements of the act of Congress) at $3,139 00.

7. That the said twelve freeholders, summoned as afore-

said, after they had assessed to the plaintiff the damages aforesaid, did, without any authority of law and contrary to the provisions of the 4th section of the act of Congress of 1809, ch. 30, under which they acted, declare, charge, and assess benefits amounting to $3,425 33, because of the opening and extending said Stoddard street, to the remaining part of said lot for injury to which damages had been assessed by them as aforesaid; thereby making, or attempting to make, said assessment for benefits a lien on the remaining part of the lot, and rendering it liable to be sold to pay to the plaintiff the damages assessed to him.

8. That the said Corporation of Georgetown has taken possession of the part of the lot belonging to the plaintiff, which has been condemned to public use as aforesaid, before the damages assessed to him for such condemnation, or any part thereof, have been paid, or secured to be paid to him, and has dug down it in places ten or more feet, and has fully appropriated it as a part of Stoddard street, contrary to the express provisions of the 4th section of the act of Congress of 1809, ch. 30.

9. That in further prosecution of its unlawful proceedings, the said Corporation of Georgetown has, contrary to the statutes giving the right of set-off, deducted by way of set-off the damages ($3,139 00) aforesaid assessed to the plaintiff, from the benefits ($3,425 33) illegally assessed to him or to his lot aforesaid, and has directed the aforesaid George W. Beall, the collector of taxes of said corporation, to sell the part of the lot not condemned belonging to the plaintiff to pay the balance of the said assessment for benefits, ($286 33;) and the said George W. Beall, as collector of taxes as aforesaid, has advertised the same in "The Georgetown Courier" newspaper, to be sold on Monday, 17th January, 1870, at public sale, to pay to the said Corporation of Georgetown the said balance, $286 33, and $8 59 commissions. (See Rec., pp. 1–3.)

To the bill in equity the appellees put in an answer. (See Rec., pp. 6–8.)

And afterwards an agreed statement of facts was filed in the case. (See Rec., pp. 8, 9.

By the answer and the agreed statement, all the facts stated in the bill in equity are admitted.

Upon the bill, answer, and agreed statement, admitting the facts stated in the bill, the Supreme Court of the District of Columbia passed the following decree:

"This cause having been heard upon the record of the equity court, and been argued by counsel on both sides, it is therefore ordered, adjudged, and decreed, that the bill of complaint be, and the same is hereby, dismissed with costs." (See Rec., pp. 14, 15.

From this decree the complainant prayed an appeal to this court, which was allowed in open court. (See Rec., p. 15.)

Points of Law.

The main question of law which is presented by these facts for the determination of this court is, *whether, by virtue of the 4th section of the act of Congress*, 1809, *ch.* 30, *which is quoted in this brief, the jurors summoned by virtue of that section had authority, after assessing damages to the appellant for the part of his lot condemned to public use, then to tax the remaining part of the lot for benefits, making it a lien on the lot, rendering it liable to be sold for the tax.*

By virtue of the section, the Corporation of Georgetown is clothed with authority to exercise the right of eminent domain in condemning private property for opening or extending streets. But this power is given with the expressed restriction, that it shall be exercised only on payment of compensation, or securing it to be paid, to the owner of the land condemned. And the section declares, that the compensation or damages shall be estimated by "taking all benefits and inconveniences into consideration." The elements, therefore, which enter in the assessment of the damages are, first, the value of the land condemned; second, a deduction of all benefits from that value; third, an allowance for the inconveniences sustained

by the owner of the property condemned. The direction of the statute, which is mandatory, that both inconveniences and benefits shall be considered by the jury in assessing damages, is very just. Because, after title to the land for a street is acquired by the corporation, it may then be graded to any level whatever, either above or below its former level, to the great inconvenience, as is done in this case, to the owner of the remaining part of the lot; and the corporation would not be responsible for the inconvenience, it being what in law is a consequential damage, *damnum absque injuria*. (20 Howard R., 135.) And without such a provision in the statute the jury would, in assessing damages, be confined to the value of the piece of land condemned. So, if the statute had not required benefits to be taken into consideration, and it says *all* benefits, the jurors would have no authority to consider them in estimating damages, but would have to measure the damages by the full value of the land condemned, without any deduction for benefits.

By virtue of this section of the act, the corporation is also clothed with the power of taxation by local assessment. This power is to be exercised on the property of those persons in the neighborhood who have been benefitted, in order that "each individual benefited thereby shall contribute and pay towards compensating the person or persons injured by reason of such opening and extension; and the names of the persons so benefited, and the sums which they shall respectively be obliged to pay, shall be returned under their hands and seals to the clerk of the corporation, to be filed and kept in his office; and the person or persons benefited by opening or extending any street, and assessed as aforesaid, shall respectively pay the sums of money so charged and assessed to them, with interest thereon, at the rate of six per cent. per annum, from the time limited for the payment thereof until paid; and the sums of money assessed and charged in the manner aforesaid, to each individual benefited in manner aforesaid, shall be a lien upon and bind all the property so benefited,

to the full amount thereof: *Provided always*, That no street, lane, or alley shall be laid out, opened, or extended until the damages assessed to individuals, in consequence thereof, shall have been paid or secured to be paid."

These two powers, the power to condemn and the power to tax, are entirely distinct powers, and have reference to two different classes of owners of property. The act of Congress conferring these two powers supposes two classes of owners of property on a street intended to be opened or extended—those who are damaged and those who are only benefited. Those who are benefited are to be assessed to pay those who are damaged. In conferring these powers, it was thought by Congress most reasonable, where a part of an owner's property was taken, to deduct any benefits to the remaining part of the lot from the damages, and not levy a tax upon him and sell his property to pay the damages. In this way both classes of owners pay for benefits: one class by *deduction*, the other class by *assessment*.

In the case before the court *both of these powers* have been exercised on the property of the appellant. After "all the benefits" have, in assessing damages for the part of the land condemned, been deducted from the damages, the remaining part of the land is assessed with benefits amounting to more than the damages which had been allowed. By referring to the "returns of the jurors assessing damages and benefits," (see Rec., pp. 9, 10,) which is a part of the "agreed statement of facts," (see Rec., pp. 8, 9,) it will be seen, as alleged in the bill of complaint, that the return first puts the appellant in the class of persons damaged, and assesses his damages at $3,139 00, and then puts him in the class of persons taxed for benefits which are made a lien on their property, and assesses a tax for benefits on the remainder of his lot at $3,425 33.

It is sufficiently manifest that by the 4th section of the act of Congress, the appellant could only be reached for benefits to the remaining part of his lot by *deduction* in estimating damages; and also that, by the process of de-

duction, the benefits could not be a lien on his property as a tax. And besides, the act of Congress puts benefits and inconveniences in a parenthesis, thereby indicating that the benefits should never exceed the damages. They were by the policy of the statute to be mere matter of deduction from the value of the land taken for public use. The parenthesis embraces "*all* benefits," so as to leave no benefits to be taxed. The benefits which are assessed to pay damages to those who are damaged are made a lien on each piece of property benefited, bearing six per cent. interest. This provision distinguishes these benefits from the benefits which are with the inconveniences to be taken into consideration in estimating damages to the owners whose property is condemned. These latter benefits are not made a lien, nor are they made to bear interest, because they become extinguished by compensation of equivalents in assessing damages. When the jurors had assessed the damages, their function was exhausted as to the owners of the property condemned, and as to them the inquisition was complete.

It is a principle of political or public law of universal application, that jurors, in condemning land for the use of a street and assessing damages, act under the right of eminent domain. And that, in assessing benefits and making them a lein bearing interest on the property benefited, the jurors act under the power of taxation. (4 Comstock R., 419; People *v.* Mayor of Brooklyn, 2 Black R., 510.) In construing the 4th section, act of Congress 1809, ch. 30, we must recognize these two powers in its respective parts applicable to two classes of owners of property.

Upon these considerations, it is submitted that the jurors had no authority, under the provisions of the 4th section of the act of Congress 1809, ch. 30, under which they are admitted to have acted, (there being no other authority given by the charter of Georgetown,) to assess the appellant with the special tax for benefits of $3,425 33 declared in their return.

If the tax be illegal, as it so manifestly seems to be, then

the property of the appellant cannot be sold for the tax by the corporation of Georgetown through its collector. And the mode which has been adopted to collect the illegal tax is a further trespass upon the rights of the appellant, and is as objectionable to law as the tax itself.

Though the statute, as we have seen, expressly declares, "That no street, lane, or alley shall be laid out, opened, or extended until the damages assessed to individuals, in consequence thereof, shall have been paid or secured to be paid," the corporation deducted the damages from the illegal tax, assuming that thereby they had paid the damages, and without any other payment or security for payment took possession of the piece of land condemned and cut it down ten feet. And then, as a further effort to collect the remainder of the illegal tax of $286 33 and $8 59 commissions, the corporation, by its collector, advertised the remainder of the part of the lot, which had not been condemned, to be sold for the payment of the remainder of the illegal tax and the commissions. The amount of money therefore involved in this controversy is the amount of the illegal tax, $3,425 33; and according to the law which regulates a special tax sale for benefits, the lot ought to have been advertised for the full amount of the tax, so that purchasers may know the full amount of the lien on the lot. The deduction of the damages, being entirely gratuitous, did not alter the case.

It was the duty of the corporation to have paid the damages at once. The city treasury is, in the first instance, liable for the entire damages. (16 Ohio R., 581, Culbertson *v.* Cincinnati.) And the Corporation of Georgetown, by an ordinance passed 15 June, 1816, has made provision for such payment when the benefits cannot be collected at once. Because until the damages are paid no street can be "laid out, opened, or extended." (7 Md. R., 500.) The condemnation by the jurors does not give title. By the condemnation the corporation, like a purchaser, becomes a debtor to the owner of the land condemned for the damages or assessed price. When the damages are paid, then

the legal title vests in the corporation as trustee for the public. (20 Howard R., 135, Smith *v.* Corporation of Washington.)

The exercise of the power of condemning private property to public use and of the power of local taxation for benefits has in the administration of municipal corporations degenerated into legal rapine. In the State of Ohio and several other States the practice of deducting benefits in estimating damages, and then assessing a tax for benefits on the other property of the owner of the property condemned became so persistent and uncontroled by the judiciary, that there is incorporated into the present constitution of that State, and of other States, a provision that the "compensation shall be assessed by a jury, without deduction, for benefits to any property of the owner," and then allowing the remaining property of the owner of the condemned property to be assessed with a special tax for benefits like the property of other owners who are benefited. (18 Ohio State R., p. 303; City of Cleveland *v.* Wick; Dillon Municip. Corp., 472.)

In order to justify the construction which has been put upon the 4th section of the act of Congress of 1809, chapter 30, the general principles of law which regulate corporate powers, and the rules for construing legislative grants to corporations, should be considered.

It has been the settled common law for centuries, without a single dissenting decision, *that corporate powers must be construed strictly, and must be exercised in the manner and forms and by the agents prescribed in the charter or legislative grants.* (2 Kent's Com., pp. 298–9; 2 Cranch's R., 127; 2 Peters's R., 544; 13 Peters's R., 587; 9 Howard's R., 192; 2 Kent's Com., 312, note *d;* 5 Wend. R., 211; Dillon on Municipal Cor., 461; *Ib.*, pp. 452–3 and 580.)

It was upon such views of the law that the appellant made his bill of complaint, praying the Supreme Court of the District of Columbia in equity to enjoin the Corporation of Georgetown and its collector of taxes, George W. Beall, the appellees in this case, from selling his property

to pay the special tax for benefits. The attempt to sell the appellant's property for an illegal tax, assessed by the jurors without authority of law, is a flagrant wrong, for which there is no adequate remedy at law, and which it is the special function of a court of equity to prevent by injunction. (9 Wheaton's R., 738; 18 Howard's R., 331; 16 Ohio R., 583; Hilliard on Injunctions, 21, *a;* Dillon on Municipal Cor., p. 688; 11 Md. R., 186; 18 Md. R., 284.)

By the territorial bill for the District of Columbia, approved February 21, 1871, by which the charters of Washington and Georgetown are repealed, it is by the 40th section provided:

"That the charters of the said cities severally, and the powers of said levy court, shall be continued for the following purposes, to wit: For the collection of all sums of money due to said cities respectively or to said levy court; for the enforcement of all contracts made by said cities respectively or by said levy court, and all taxes heretofore assessed remaining unpaid; for the collection of all just claims against said cities respectively or against said levy court; for the enforcement of all legal contracts against said cities respectively or against said levy court, until the affairs of said cities respectively and of said levy court shall have been fully closed; and no suit in favor or against said corporations or either of them shall abate by reason of the passage of this act, but the same shall be prosecuted to final judgment, as if this act had not been passed."

It is seen that this suit stands as if no such act had been passed.

SAM'L TYLER,
Solicitor for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

FREDERICK W. HANNEWINKLE,
APPELLANT,

vs.

THE CORPORATION OF GEORGETOWN

AND

GEORGE W. BEALL,
APPELLEES.

ARGUMENT FOR APPELLEES.

WILLIAM A. COOK,
for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES.

——— Term, 1872-1873.

FREDERICK W. HANNEWINKLE,

vs.

THE CORPORATION OF GEORGETOWN, AND GEORGE W. BEALL, COLLECTOR.

STATEMENT.

On June 6th, 1868, the late Corporation of Georgetown passed an ordinance for opening and extending Stoddard street.

A jury, or "twelve freeholders," were accordingly summoned by the Mayor to ascertain and determine the damages and benefits arising from the opening and extension.

The jury having been thus summoned and duly sworn proceeded in the performance of their duties, and placed the result in writing over their several signatures.

So far as pertinent this "return" or report was as follows:

"Return of the jurors for assessing damages and benefits on the extension of Stoddard street, Georgetown, D. C.

"We, the undersigned, freeholders and inhabitants of Georgetown, in the District of Columbia, not directly interested in the premises hereinafter mentioned, upon which damages and benefits are assessed, being duly summoned as jurors by the Mayor of Georgetown aforesaid, and being first sworn to assess and value what damages will be sustained by any person or persons by reason of the laying out and extending of Stoddard street in said town, from Congress street to High street, do hereby assess said damages and benefits, as follows:

Damages.

To Anthony Hyde	$5,000 00
Noble Hurdle	830 00
Mrs. Sarah Willett	1,050 00
Mrs. B. Kennon	1,202 75
F. W. Hannewinkle	3,139 00
	11,221 75

Benefits.

To the Corporation of Georgetown, 1-6 of the damages	$1,870 29
Mrs. Willett, on 113 ft. 8 in., on south side Stoddard st., at $4 pr. ft	454 67
Mrs. Willett, on 91 ft. 10 in., on north side Stoddard st., at $3 pr. ft	275 50
Mrs. Kennon, on 473 ft., north side Stoddard st., at $5 pr. ft	2,365 00
Mr. Hannewinkle, on 489 ft. 4 in., south side Stoddard st., at $7 pr. ft	3,425 33"

* * * * * * *

The damages and benefits "assessed" as respects the appellant arose out of the fact that he was the owner of a piece of ground, part of which was taken for the extension of the street, while the remaining portion became bounded by it.

His damages were accordingly fixed at $3,139.00 and his benefits at $3,425,03—or $286.33 more than the damages.

This difference was not paid. The Corporation credited the amount allowed for damage and advertised the property for sale for the difference, or the *two hundred and eighty-six dollars and thirty-three cents, with interest*, when a bill was filed to enjoin the proposed sale.

Certified from the Equity Court, to the General Term below, the bill was dismissed.

THE POSITIONS OF THE APPELLANT.

It is conceded that the late corporation of Georgetown, in this District, in exercising its powers to open, extend, and improve streets, possessed the right and authority to assess benefits as well as damages to the owners of property affected by the work. The constitutional validity of the power to lay and impose benefits to defray the expenses of such improvements has been so repeatedly adjudicated, and the power itself has been so universally exercised in the United States, that no one now seriously pretends to question it.

In the present controversy, whilst the general power of assessing benefits is readily admitted, two limitations upon its exercise are contended for by the appellant.

(1.)

The first limitation, he maintains, is found under his construction of the 4th section of the Congressional act of 1809, ch. 30, whereby the power of estimating bene-

fits is entirely exhausted by a necessary involvement in the estimation of damages.

(2.)

And the second limitation he urges is, that under no circumstances whatever can a greater amount of benefits than damages be assessed to any man.

If he is correct in either of these views, and there is chancery jurisdiction of the cause, his injunction must be made perpetual. If, on the other hand, these objections to the exercise of the powers claimed by us are not well founded, his injunction must be dissolved.

I.

THE ACT OF CONGRESS EXAMINED IN REFERENCE TO THE FIRST POSITION.

The first question, then, for consideration is as to the meaning of the 4th section of the act of 1809.

That meaning can be the better ascertained by examining the law in connection with the interpretation sought to be given it by the appellant, and accordingly, by brief analysis it will be shown *what it is* by showing *what it is not.*

The following is the section referred to:

"IV. *And be it further enacted*, That the said corporation shall have power to lay out, open, extend and regulate streets, lanes, and alleys within the limits of the town, as before described, under the following regulations; that is to say, the Mayor of the town shall summon twelve freeholders, inhabitants of the town, not directly

interested in the premises, who, being first sworn to assess and value what *damages* would be sustained by any person or persons by reason of opening or extending any street, lane, or alley, [*taking all benefits* and inconveniences into consideration,] shall proceed to assess *what damages* would be sustained by any person or persons whomsoever, by reason of such opening or extension of the street; and shall also declare to what amount *in money each individual benefited thereby shall contribute and pay towards compensating the person or persons injured* by reason of such opening and extension; and the names of the person or persons *so benefited, and the sums* which they shall respectively be obliged to pay, shall be returned, under their hands and seals, to the clerk of the corporation, to be filed and kept in his office; and the person or persons *benefited* by opening or extending any street, and assessed as aforesaid, shall respectively pay the sums of money so charged and assessed to them, *with interest* thereon, at the rate of six per cent. per annum, from the time limited for the payment thereof until paid; and the sums of money assessed and charged, in manner aforesaid, *to each individual benefited* in manner aforesaid, shall be *a lien* upon and bind all the property *so benefited* to the full amount thereof: *Provided always*, That no street, lane, or alley shall be laid out, opened or extended, until the damages assessed to individuals, in consequence thereof, shall have been paid or secured to be paid."

Now, according to the appellant's construction of this provision, the jury (for so, as a matter of convenience, may be called the twelve freeholders,) are imperatively and inextricably bound to mix the estimate of damages and benefits, and strike the difference, having no power to designate separately the respective amounts of damages and benefits. In other words, whenever they happen to employ the term "damages," it essentially and of necessity, under his conception of the law, includes and exhausts all consideration of the question of benefits. The

simple and conclusive answer to this pretension is, that it is in conflict with the letter of the statute, requiring that the jury *shall also* declare *to what amount in money* each individual benefited shall pay towards compensating the person or persons damaged, and that they shall return the names of the benefited persons together with the sums they shall be respectively obliged to pay. If, then, the whole subject can be passed through the minds of the jury by one single effort of calculation, and the balance of that calculation alone exhibited; and if that balance is to be taken as final and conclusive of all that is required of them in the discharge of their office, without showing what sum is for damages, and what sum is for benefits, where was the necessity of setting forth in the statute, with so much particularity and precision, the duties of the jury, in not only finding, but in *returning*, in their verdict, their appraisal of benefits separate and distinct from their appraisal of damages?

In the large majority of instances the same individual is both benefited and damaged by the contemplated improvement. If, accordingly, under this statute, the jury in setting down the damages are presumed to have ascertained the amount as a balance over and above benefits *mentally estimated*, and therefore to have exhausted their power of considering benefits, what possible significance can be imputed to the strong and unequivocal direction "that the jury *shall also* declare to what amount in money each individual shall pay towards compensating the person or persons damaged?"

Appellant's construction would leave all this provision without force or significance.

The terms "also," "declare," "each," "sums," "respectively," which are inserted in this section of the law *ex industria*, leave no such discretion to the jury as that claimed for them by the appellant; but, on the contrary define their duties with such accurary and clearness that any omission to obey the obvious import of these terms would render their verdict invalid.

Although, under some of the statutes of the different States, it has been held competent for the power selected to assess damages and benefits for street and road improvements, to consider both damages and benefits together, ascertain the balance, and report that alone, still, under the phraseology and peculiar structure of this section of the law, it would in my judgment be a defective performance of duty if the jury adopted this plan of proceeding. That is to say, if they returned, generally, a balance of either benefits or damages, without showing the extent of the ascertainment of both these elements, it would be a fatal and palpable omission of what is plainly required of them. Because, to ascertain and *declare* both these elements is made imperative by the law; and, moreover, because in the construction of a statute every part of it must be viewed in connection with the whole, so as to make all the parts harmonious, if practicable, and give a sensible and intelligent effect to each; nor should it be presumed that the Legislature meant that any part of the

statute should be without meaning, or without force and effect.

Ogden v. Strong, 2 Paine, N. Y., 584.

Whilst it *might* be conceded that this section is to be tested by a strict construction, it must nevertheless be a reasonably strict construction, and such as will best carry out the will of the Legislature. A strict construction, however, is not to be given to it *merely* upon the ground that it authorizes the taking of private property for public use upon making compensation, and therefore is in derogation of common right.

Chesapeake and Ohio Canal Co. vs. Key, 3 Cranch, Cir. Ct. R., 599.

A construction, that warps and confines the meaning of a statute to one branch or part only of a subject or duty contemplated by it is not, the proper construction; be-

cause of its deficiency in making every part of the law operative. If by sticking in the bark we are to lose the efficacy of a statutory provision we are warranted in enlarging the construction. If a too cramped and literal interpretation practically works a denial of the very power which constitutes the chief value of the enactment, we should undoubtedly literalize the interpretation. Hence, in such equitable light are we to construe this statute. For, if we are to so read it as to make it obligatory on the jury to assess benefits on the identical property alone upon which damages are assessed, then the law is loaded with senseless surplus age, and affords none of the relief to the public which the idea of assessed benefits obviously imports.

Let us examine this section, with a little closer scrutiny down to the second proviso, as containing all that is pertinent to this case.

It divides itself into clauses.

The first contains the grant of power to open streets.

The second indicates the qualifications of the jury.

The third prescribes the oath to be taken by the jury.

The fourth and fifth fix the particular duties of the jury.

The sixth declares the obligations of the persons benefited.

The seventh gives a specific lien on the benefited property.

And the proviso, or eighth clause, requires the payment of damages assessed or security of payment.

Now we will pass over the first two clauses, as not at all in dispute, and come at once to consider the others.

The oath administered to the jury is, in terms direct, to assess and value what damages would be sustained by any one in consequence of opening or extending the street; but that oath is indirectly, though indisputably, enlarged by the phrase which my be called the parenthesis, the one contained in brackets, requiring them to "take all benefits and inconveniences into consideration."

This parenthesis is but another way of saying that the jury shall be sworn to assess and value the damages to be sustained, as well as the benefits to be derived, and shall thereupon proceed to find the amounts, respectively, of one and the other, and return those amounts, together with the names of the persons damaged and benefited.

If it were true, even under a constrained interpretation of this clause of the section, that the jury were *only sworn* to assess damages, that would not relieve them at all from the duty, imposed without an oath, to assess benefits. The law is so plain on this point that he who runs may read. What difference, in effect, does it make if a jury, by the imperative provisions of the section, ascertain damages under the obligations of an oath, and ascertain benefits without acting under such obligation? The result of their action is inevitably the same, oath or no oath. But it is evident that by being sworn to take all benefits as well as inconveniences into consideration, their oath embraced both subjects, that of damages and that of benefits. For the Court will not fail to perceive that the word "inconveniences" is carefully employed, and in this

connection is synonymous with the word "damages." The punctuation, as well as the simple and natural import of the language, shows that this parenthesis belongs to the preceding portion of the clause, to wit, "who being first sworn to assess," &c., and constitutes an essential element of the oath. It can only make sense by being connected with that preceding portion of the clause. This oath, then, to assess and value both damages and benefits, is unmistakeably gathered from the third clause of the section, as its terms and grammatical structure plainly indicate. In the succeeding clauses is set forth a more particular and precise enumeration of the jury's duties, which duties being entirely compatible with the tenor of the oath itself, relate back to and clearly fix its character, if there could have been any reasonable doubt as to that character

Suppose that the parenthetical phrase "taking all benefits and inconveniences into consideration" was transposed and inserted in the fifteenth line of the section after the semicolon at the end of the word "extension," it would be perfectly plain that two distinct duties to be performed by the jury were pointed out, an omission of either one of which would be a palpable violation of the law.

So that, in either view of the case, keeping that phrase where it is, and where it grammatically belongs, or shifting it to the place suggested for illustration, the conclusion is inevitable, that the jury are to ascertain damages *and benefits, as separate and distinct items*, which items together with others contemplated in the section constitute a totality known as their verdict or in-

quisition. If the jury are to pass upon the subject of damages and benefits by one and the same mental calculation, deducting the latter from the former, and leaving the exclusive item of damages in their verdict, is there anything to show but that they have negatived their duty, and ignored the provision which requires them to *declare* to what amount in money each individual benefited shall contribute to indemnify the persons damaged, and also to return the names of the benefited individuals? How shall they *declare* the amount in money? By silence? By conjecture? By omission? By vague inference? By altogether pretermitting such duty? This, indeed, would be a striking commentary upon legal accuracy.

The appellant's mode of executing the law, by simply giving the difference, would, upon the face of the verdict itself, warrant the inference that the jury had omitted the consideration of either one or other of the important subjects to which their inquiry was specifically directed, to wit: damages, or benefits. There would be nothing to show, affirmatively, that they had performed their whole duty by considering both. By simply exhibiting the fact in their return of either damages or benefits alone ascertained, there would be as much ground for concluding that they had ignored one or the other element, as that they had considered both. This would be a defective execution of their duty, as unequivocally and emphatically prescribed by the statute, and therefore it cannot for a single moment be maintained that their gross item of damages necessarily embraced and exhausted all consideration of benefits. In their return they have properly

gratified every requirement of the law; and if they have not formally, on the face of that return, subtracted the amount of damages from the amount of benefits, it is immaterial, for the reason that the difference is patent, and its expression in precise mathematical figures is a mere clerical or ministerial act. The respective amounts of damages and benefits are stated in their return, and the difference between these amounts, in any individual case, mathematically and inevitably results from the bare statement.

When we view the whole scope and extent of the powers, together with their peculiar character, conferred by the statute, the necessity of plainly distinguishing in the verdict what assessments are for damages and what for benefits, will be readily perceived.

It is conceded that the corporation of Georgetown can, under its chartered privileges, lay out, open and extend streets.

It is also conceded that it can, through the instrumentality of twelve freeholders, assess damages for losses sustained, and benefits for gains accrued.

Now, then, let us examine and see by what warrant of authority conferred on or inherent in Congress, and delegated to this municipality, these damages and benefits are assessed.

Unquestionably not by one and the same power, but by two substantive, independent and distinct powers; one the power of eminent domain, the other the power of taxation. And here in briefly discussing this branch of the subject, the views, and frequently the very language

itself, of Judge Ruggles in rendering the decision of the court in the case of The People vs. The Mayor of Brooklyn, reported in 4th Comstock, page 420, is adopted.

These two powers—the power of eminent domain and the power of taxation—are reserved by the people collectively over individual property, whereby such portions of that individual property as the public may require can be resumed. Both are exercises of the sovereign power over individual property, and rest substantially on the same foundation. Compensation is made when private property is taken in either way—that is, by the right of eminent domain, or by the right of taxation. Money is property. Taxation takes it for public use, and the tax payer receives, or is presumed to receive, his equivalent for the contribution, in the protection given to his life, liberty and property, and in the increased value of his possessions, by the use to which the money raised by the tax is applied.

When private property is itself taken for public use by the right of eminent domain, it is taken not as the owner's share of a contribution to a public burthen, but as so much beyond his share, and hence special compensation is made, because the Government is a debtor for the property so taken.

Taxation operates upon a community, or class of persons in a community, and by some rule of apportionment.

The exercise of the power of eminent domain operates upon an individual, without reference to the amount exacted from any other individual or class of individuals.

Taxation leaves the subject or property producing the

tax in the ownership of the individual taxed; the enforcement of the right of eminent domain wrests private property in specie from the ownership of its proprietor.

Thus the two powers, conferred on the municipality by this statute, affect the appellant and his property differently, and hence the necessity of showing that difference by particular designation.

The land necessary for the bed of the street is itself appropriated to the public use by the right of eminent domain, and its value must be made good to the owner.

The money assessed for benefits to the residue of his property not appropriated to any part of the street in question, does not result from the exercise of the power of eminent domain, and the validity of its assessment cannot be maintained at all, says Justice Ruggles, unless it be a legitimate mode of taxation.

The expense of this work might rightfully have been raised by general taxation throughout the town. But Congress thought proper to shift the burden upon those persons exclusively whose property was benefited by the work, and to impose it on them in proportion to the benefit respectively received therefrom. The change in the apportionment of the burthen was obviously made to avoid the injustice of general taxation for a special local object, the benefit of which extended only to a portion of the inhabitants of the town. This was according to the maxim that "he who enjoys the advantage ought to bear the burthen." This equitable rule of apportionment, therefore, shows that the assessment was taxation, and not an attempt to exercise the right of eminent domain.

Hence the conclusion from these premises will bear repetition and emphasis, *that it was indispensably incumbent upon the jury to ascertain, in separate and distinct items, and not as a mere deducted balance, both damages and benefits; the statute, as appellant's bill expressly alleges, comprehending two classes of persons—the injured and the benefited, and, by consequence, damages and benefits.*

It thus appears that from a fair, simple, and natural construction of the statute there is not even a plausible reason to support the position assumed by the appellant, that the finding of the item of damages by the jury necessarily precluded their finding a separate item of benefits.

II.

THE SECOND POSITION CONSIDERED.

The second limitation upon the exercise of the power conferred by the statute, as contended for by the appellant, is, that no assessment or payment of benefits can exceed the amount of damages laid.

It is difficult to perceive the reasonableness or propriety of this position.

It is an assumption entirely unsupported by justice.

That a man should be indisputably benefited one thousand dollars by a public improvement, and yet be only obliged to contribute one hundred dollars, simply because that sum is the full market value of a few feet of ground taken for that improvement, cannot, I humbly submit, be sustained upon any principle of reason, equality or fair dealing.

For instance, it becomes absolutely necessary to acquire a small portion of his land to make the proposed street. For that portion he receives an equivalent. But the contemplated street largely enhances the value of his adjacent premises. Why should not he contribute in proportion to that enhancement? Is there anything in common sense or sound reason that should exempt him from liability to the full extent of the benefits appraised?

Nothing, in the object of the law, in its spirit, or in its letter, countenances such an idea in the remotest manner. If such a theory as that upheld by the appellant is to be derived from this law, it is idle to attempt the local assessment of benefits. If there is simply to be a stand-off between damages and benefits, the public at large are obliged practically to bear the burden of a purely local improvement. The very injustice of such a pretension is its own sufficient answer.

But examine the law critically with reference to this question, and it will be seen there is no restriction, no limit, or modification in its phraseology, that warrants any such interpretation. That phraseology is affirmative, explicit, and unequivocal. It requires the jury to *declare* to what amount in money each individual benefited shall

contribute towards compensating the person or *persons* injured. Mark the word "persons." The plural, as we shall presently see, is significantly employed. There is no negative or restraining qualification whatever as to the limit of benefits to be assessed, or the amount of benefits to be paid by any one after those benefits have been assessed. Of course, it is conceded that no one can be assessed beyond the benefit which he will derive from the improvement. But, of this benefit over and above the loss and damage sustained by any person, the jury are to be the exclusive judges; and there would be neither sense or consistency in their appraisal of these surplus benefits, if no more of them could be exacted than the precise amount of damages they had awarded to the same individual.

To show conclusively that Congress never meant that the benefits to be paid by any one were to be confined in amount to the damages allowed him, it expressly says that these benefits are to be paid to the person or *persons* injured, thereby indicating that these benefits shall not only go towards compensating him for his own losses, but also towards compensating the losses of other property-holders on the line of the improvement. The studious employment of the word "*persons*," in this connexion, fixes the true meaning of the statute, utterly excluding and negativing the idea that under no circumstances can a greater amount of benefits be exacted than the amount of damages allowed to any single individual.

If such a meaning as that contended for by the appellant had been contemplated by Congress, how easy it

would have been to have so expressed it, just as, for instance, it did express it in the charter of the Chesapeake and Ohio Canal Company, where, after authorizing the jury to condemn lands for the use of the canal, and, in so doing, to consider the actual benefit accruing to the owner by reason of the public improvement, the following saving or provision is carefully inserted:

"Except that no assessment shall require any such owner to pay or contribute anything to the said company, where such benefit shall exceed, in the estimate of the jury, the value and damages ascertained as aforesaid."

In this enactment we have an implied legislative declaration of opinion, almost as strong as an express one, that unless positively prohibited, the power granted to assess benefits as well as damages, would carry with it the power to enforce the payment of whatever benefits might be imposed, over and above the damages ascertained.

A cursory examination of all the authorities (and they are many) touching the appraisal of damages and benefits, will satisfy any one that no such idea as that advanced by the appellant, to wit: that the benefits are to be limited in assessment and payment to the amount of damages accruing to the same individual, has ever been entertained, except where there was some positive provision of statutory law requiring such limitation.

III.

SET-OFF EXAMINED.

A few words upon appellant's objection of set-off in this case.

Taking it as well established that the two powers adverted to—that is to say, the power of eminent domain and the power of taxation, were conferred by the statute upon the corporation of Georgetown, and that it was requisite for the jury, in the discharge of their duty, to exercise both these powers, does it not necessarily follow that the respective amounts of damages and benefits assessed were distinctly ascertained and liquidated debts or demands to and from the owners of property affected by the street improvement?

Then, this being true, where is the difference, in effect and in equity, of the proceedings, first of collecting the benefits, and then paying the damages out of them, and on the other hand, of adjusting the matter *directly*, by way of set-off, except that the latter mode is easy, simple and natural, and the former circuitous, slower, and more expensive.

If the Court will take equitable cognizance of this case, it assuredly will not encourage such a technical objection as that raised by the appellant, who himself has invoked its chancery jurisdiction in the premises; especially when by disposing of the whole subject before it, it will discountenance circuity of action and effectuate substantial justice.

That the increased value of adjacent property can be

set off against the damages sustained by the owner in taking another portion of his property for a public street, and be considered as a just compensation for the property so taken, is the very aim, end, and object of the law. There cannot be a difference of opinion upon this point.

Chancellor Walworth in his decision, in Livingston vs. The Mayor of New York, 8 Wendell's Rep., pages 101–102, says:

"It is not denied that the legislature have the power to authorize the taking of private property for the purpose of public streets upon making just compensation to the owners; but it is insisted by the plaintiff's counsel that the increased value of the adjacent property belonging to the same individual can not be set off against the loss or damage sustained by him in taking his property for a street, and be considered as a just compensation for the property so taken; and that in all cases the average must be ascertained by the verdict of a jury. I have recently had occasion to examine these questions also, in the case of Beekman v. the Saratoga and Schenectady Railroad Company, 3 Paige, 45, and came to the conclusion that both of these objections were untenable. The owner of the property taken is entitled to a full compensation for the damage he sustains thereby, but if the taking of his property for the public improvement is a benefit rather than an injury to him, he certainly has no equitable claim to damages. Besides, it is a well settled principle, that where any particular county, district or neighborhood is exclusively benefited by a public improvement, the inhabitants of that district may be taxed for the whole expenses of the improvement, and in proportion to the supposed benefit received by each. In this case, if the whole value of the property taken for a street in the city of New York is allowed to the individual owner, the proprietors of the adjacent lots must be assessed for the purpose of paying that amount, and if the individual whose property is taken is the owner of a lot adjacent, that lot must be assessed ratably with

the others. It therefore makes no difference whether he is allowed the whole value of the property taken in the first instance, and is assessed for his portion of the damage, or whether the one sum is offset against the other in the first place, and the balance only is allowed."

This is well-settled law, and it is not easy to conceive of a valid objection to its soundness and wisdom.

It is lawful to assess benefits, and consequently to enforce their collection. Of course, when collected, the funds applied to the liquidation of assessed damages furnish a just compensation for private property taken for the public use. Therefore it is obvious that if these beneficial funds are appropriated, either in direct payment or by way of set-off, it amounts precisely to the same thing.

In the matter of William and Anthony streets, reported in 19 Wendell, page 681, Judge Bronson says that—

"The duty of Commissioners of Estimate and Assessment consists in ascertaining what shall be the effect of the proposed improvement upon the several owners of property within its influence. They are to inquire who will suffer loss and damage, and who will derive benefit and damage and advantage, and to make such an estimate and assessment as will secure just compensation to the one, and subject the other to nothing more than a reasonable burden. If the commissioners have done this, no one has a right to complain that they have not done more."

In the present case we say the jury have done this. The appellant alleges in his bill that they have done it, though he characterizes their action as illegal; and having done it we earnestly, but with great deference for others, contend that their finding in the premises, being entirely

consistent with the provisions ot the statute, is conclusive, and cannot be the subject of revision in a court of chancery.

In street cases "a substantial compliance with the law is essential, but it is not necessary to prove that all the formalities of the statute or ordinance should be observed. They are directory in their character; if the end is attained, it cannot be of much importance how it has been reached." St. Joseph's v. Anthony, 30 Missouri, 537.

IV.

COLLECTION BY NOTICE AND SALE.

But, says the appellant, conceding the powers claimed by us, and the regularity of their exercise in respect of the assessment of damages and benefits, and conceding further the specific lien given upon benefited property we have no right to proceed to enforce the payment of those taxes under that lien by the summary process of notice and sale; for inasmuch as the statute points out no particular mode of enforcing that lien, our remedy is only in a court of chancery.

Without stopping to discuss this objection, and neither admitting or denying its soundness, we have simply to

say that your honors are saved the trouble of its consideration; since the power of summary sale in this and all cases of delinquency of tax-payers has been expressly conferred by Congress upon the Corporation of Georgetown. An act to authorize the Corporation of Georgetown in this District to lay and collect a water tax, and for other purposes, approved May 21, 1862, provides in the 5th section as follows:

"That in case of a failure to pay *any tax whatever* laid by said corporation by virtue of its vested powers, it shall be lawful to sell in the discretion of the collector, or other proper officer, either the real or personal estate, or both of the delinquent tax-payers."

Having already seen that the benefits assessed are only so assessed by virtue of the power of taxation, and that they are, to all intents and purposes, taxes, the enforcement of their payment is clearly provided for in the section of the act of Congress just cited.

V.

JURY TRIAL.

In reference to the appellant's objection to the 4th section of the act of 1809, under which the appellees justify their proceedings in the premises, it is unnecessary to go into an elaborate argument to show that it is not wel taken.

It may be disposed of briefly as follows:—

The 7th article of the Constitution of the United States provides that *in suits at common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. "This provision relates to the trial of issues of fact, in civil and criminal proceedings in courts of justice, and has no relation to cases of this kind. In fixing the compensation to be allowed for land taken for public use, it is not necessary to give the owner the right to try the question of damages by a jury."

Livingston v. Mayor of New York, 8 Wend., 102.

Petition of Mt. Washington R. R. Company, 35 N. Hamp., 134.

Beekman v. Saratoga R. R. Company, 3 Paige, 45.

VI.

JURISDICTION.

1

Upon the subject of jurisdiction, we shall avoid trespassing upon the patience of the court as much as possible, by briefly stating, from authority, the principles of law governing such cases.

The appellant's bill prays that the appellees be enjoined from proceeding to collect and enforce the above mentioned assessment against him, solely upon the ground of illegality in their proceedings, and of alleged unconstitutionality of their authority in the premises.

There is *no allegation in the bill of fraud, of a cloud upon his title which equity alone has power to remove, of danger of a multiplicity of suits, or of irreparable injury to his freehold.*

2

Now it is indisputable law that a party who brings an equitable action, must maintain it upon some equitable ground, and if the cause of the action is of a legal, and not of an equitable nature, he must bring a legal action, or pursue a legal remedy. "Where a matter is clearly or *prima facie* one of legal cognizance, a party must, in order to maintain an equitable action upon it, state clearly facts sufficient to entitle him to equitable relief, and to show that a perfect remedy cannot be obtained at law."

The case of Mooers v. Smedlay and others, 6 Johns. ch. R., 28, directly affirms this doctrine as applied to the case now under consideration. The bill there was filed to enjoin the collector of a town from collecting a tax, and the supervisor from paying over the money, on the ground that the board of supervisors had levied the same in direct *violation of law.* But Chancellor Kent refused to interfere, and in the course of his opinion observed:

"I cannot find by any statute, or precedent, or practice, that it belongs to the jurisdiction of chancery, as a court of equity, to review or control the determination of the supervisors; but that the review and correction of all errors, mistakes and abuses in the exercise of the powers of subordinate public jurisdiction, and in the official acts of public officers, belongs to the supreme court. That it has always been a matter of legal, and never a matter of equitable cognizance, and that in the whole

history of the English court of chancery, there is no instance of the assertion of such a jurisdiction as thus contended for. The courts have thus far steadily refused to lend their equitable powers for such purposes. The usual and undoubted remedy, by *certiorari*, is always open to every party conceiving himself aggrieved. That writ brings up the proceedings of the inferior body for review, and judgment passes directly upon their proceedings and determinations thus reviewed."

Judge Nelson says, in the Mayor of Brooklyn v. Meserole, 26 Wend., 139:

"The question whether these subordinate tribunals have acted in pursuance of the powers conferred upon them by law, and whether their acts are *void* or *valid*, involve an examination of purely legal principles, unmixed with equity. Their acts are tried by the stern letter and spirit of the charter, or statute, under which they proceed; and if found to have transcended it, they are regarded in the light of naked trespassers invested of authority, and as such responsible in the appropriate tribunal."

And in Heywood vs. the City of Buffalo, it is said—(4 Ker. 542:)

"The doctrine established by the decisions is substantially this: that if the proceedings are void upon their face, they form no cloud upon title, and no ground of interference by a court of equity. And if they are not void upon their face, but merely voidable or irregular, a court of equity will not take cognizance of them, unless other facts are alleged sufficient to bring the matter clearly within some acknowledged head of equity jurisdiction. This is a sound and salutary rule, which should be steadily adhered to upon considerations of public interest and convenience, if no other. It is not the business of courts to furnish new remedies to parties aggrieved, even though existing ones are found inadequate to afford perfect protection or redress. That falls more properly within the province of the legislature. But if they had the power they would hesitate before extending their equitable jurisdiction over all the acts of these inferior bodies, and allowing every one assessed to come in and litigate as to

the validity of his tax, before he should be required to pay it, who could allege some error in making the assessment."

In the present case, if the proceedings of the town councils and of the jury are void, a simple action of trespass will afford full redress, both in respect of the unauthorized invasion of appellant's lands by the officers and agents of the corporation, or in case of an attempt to collect the assessment.

If they are *not* void, the court has no power to interfere.

Van Doren v. Mayor of New York, 9 Paige, 388.
Livingston v. Hollenbods, 4 Barb., 10.
Mooers v. Smedley, 6 Johns. Ch. R., 28.
Thatcher v. Dusenberry, 9 How. R.. 32.
Boston v. City of Brooklyn, 15 Barb., 375.
Kelsey v. King, 32 Barb., 413.

3

But why refer to these cases? *This* court has determined that an injunction will not ordinarily lie to prevent the collection of taxes; and also that errors or irregularities in taxes or assessments must be corrected by *certiorari*.

Dows v. City of Chicago, 11 Wallace, 108.
Ewing v. City of St. Louis, 5 Wallace, 413.

These cases, it is presumed, will be conclusive of the question of jurisdiction.

The remedy of the appellant was ample at law. At the utmost, his bill is founded on technicalities—or irregularities—and is without any real merit.

WILLIAM A. COOK,
for Appellees.

HUGH CAPERTON and
CHARLES F. PECK,
Solicitors below.

5. Howard S. C. 6
3 Howard S. C. 371
4 Peters. 168
1. McLean 337
Hughes Dec. 194